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Original Jurisidiction—Interstate Water Pollution: Alternatives to the Original Jurisdiction of the United States Supreme Court—Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971)

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ORIGINAL JURISDICTION—INTERSTATE WATER POLLUTION: ALTERNATIVES TO THE ORIGINAL JURISDICTION OF THE UNITED STATES SUPREME COURT—*Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

Ohio, alleging that foreign corporations[1] were polluting Lake Erie's waters by discharging mercury into tributaries of Lake Erie, sought to invoke the original jurisdiction of the United States Supreme Court by moving for leave to file a bill of complaint.[2] Ohio desired a decree declaring the alleged pollution a public nuisance, granting injunctive relief, ordering removal of the mercury, and requiring payment of damages. The Court denied the motion for leave to file the bill of complaint. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

In declining to exercise the concurrent original jurisdiction the Court acknowledged it possessed over the action,[3] the Supreme Court

1. Defendant corporations are the following: Wyandotte Chemicals Corporation, incorporated in Michigan and having its principal place of business there; Dow Chemical Corp., a Delaware corporation whose principal place of business is Michigan; and Dow Chemical Corp. of Canada, incorporated in Ontario and having its principal place of business there. Dow U.S. is involved only because it is the sole stockholder of Dow Canada. Its Michigan facility is not accused of discharging mercury.

2. The U.S. Constitution grants the Supreme Court original jurisdiction in all cases "in which a State shall be Party." U.S. CONST. art. III, § 2. The implementing statute gives the Supreme Court original and *exclusive* jurisdiction over "All controversies between two or more States," but grants only *concurrent* original jurisdiction with the state and lower federal courts over "All actions or proceedings by a State against the citizens of another State . . ." 28 U.S.C. §1251 (1970).

3. Since a state is not considered a citizen for diversity purposes, Krisel v. Duran, 386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968), the Supreme Court's refusal to exercise its discretionary jurisdiction means that the action must be tried in the state courts unless a federal question is involved. 28 U.S.C. §1331 (1970). Since Ohio's claim is for relief from a public nuisance, *Wyandotte* probably does not raise a federal question under traditional doctrine. Past decisions indicate that disputes over navigable waterways do not raise a federal question unless the construction or application of a particular federal statute is an integral part of the plaintiff's complaint. This principle has been applied even though the federal government has the unquestioned power and authority to regulate each individual navigable waterway if it so elects. In support of this reasoning see Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1888); Woods v. Root, 123 F. 402, 404 (7th Cir. 1903); South Carolina v. South Carolina Elec. & Gas Co., 41 F. Supp. 111, 115 (E.D. S. Car. 1941); Arkansas v. Texas Gas Transmission Corp., 171 F. Supp. 413 (E.D. Ark. 1959); Adams v. California, 176 F. Supp. 456, 458-59 (N.D. Calif. 1959). On federal question jurisdiction, see C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 54-59 (2nd ed. 1970). Proposing that federal common law should be a permissible basis for federal question jurisdiction, Wright concludes that "pragmatic considerations" merit evaluation where federal question jurisdiction is debatable. *Id.* at 58-59. On whether a dispute over navigable waters raises a federal question, see Annot., 14 A.L.R.2d 992, 1166 (1950). Despite the authority of the foregoing cases, Woods and Reed, relying on Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), assert that a federal question is involved in the *Wyandotte* situation. Woods and

recognized that time constraints preclude its unrestricted exercise of discretionary jurisdiction. The Court justified its decision to decline jurisdiction on three main grounds. First, state long-arm statutes guaranteed the availability of an equally unbiased and competent alternative judicial forum with *in personam* jurisdiction over the parties.[4] Second, time-consuming factual complexities, unsuited and detrimental to the Court's primary appellate function, predominated yet raised no serious issues of federal common, statutory, or constitutional law.[5] Third, other conciliatory agencies involved in the dispute were more competent to deal with the situation on a practical basis and to resolve the whole problem, rather than judging only one aspect of it as the Court was asked to do in the instant case.[6]

Adopting arguendo the Court's assumption that Ohio is the proper forum to grant relief,[7] this note will examine whether the Ohio courts and existing pollution control agencies comprise an effective mechanism to resolve the dispute, given existing law governing *in personam* jurisdiction, full faith and credit, and interstate water pollution. Before examining these issues, it will be helpful to review the Supreme Court's past decisions to hear *parens patriae* actions in its original jurisdiction.

I. THE SUPREME COURT AND PAST *PARENS PATRIAE* ACTIONS

Under the doctrine of *parens patriae,* a sovereign state may file suit on behalf of its citizens against another state or its residents when ex-

Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case,* 12 ARIZ. L. REV. 691, 702-14 (1970). [Hereinafter cited as Woods and Reed]. Neither Woods and Reed nor the Court in *Texas v. Pankey* chose to mention the contrary case authority discussed *supra.*

4. *Wyandotte,* 401 U.S. at 497, 500.

5. *Id.* at 503-04.

6. *Id.* at 502, 503.

7. Woods and Reed, *supra* note 3, evaluate the *desirability* of the possible forums for the resolution of the *Wyandotte*-type pollution dispute, and conclude that the Supreme Court, the *national* forum, is most desirable because of the uncertainty of the Ohio court's jurisdiction under Ohio law, the questionable extrastate enforceability of an Ohio injunction and the possible bias of Ohio courts against foreign industry. Woods and Reed see the federal district courts as the second most desirable forum, and conclude that the real reason for the *Wyandotte* decision was the Supreme Court's fear of overburdening its already strained docket. *See* 1 ENV. L. REP. 10038, 10041-42 (1971), which examines the *Wyandotte* decision, for a discussion of the disadvantages of having *any* forum apply state public nuisance concepts in environmental conflicts between a state and nonresident polluters.

trastate activity threatens the health, comfort or welfare of the plaintiff state's citizens.[8] *Parens patriae* actions have been allowed when a state complained of injury to its citizens' health and welfare caused by pollution originating in another state.[9] Although the Supreme Court's original jurisdiction in most of these *parens patriae* actions has rested on its exclusive jurisdiction over interstate controversies,[10] the Supreme Court twice has exercised original jurisdiction over *parens patriae* pollution suits brought by a state against citizens or corporations of another state.[11]

The Supreme Court's invariable concern in deciding whether to exercise its original jurisdiction has been the availability of an impartial alternative forum. As early as 1793,[12] the Supreme Court stated that its original jurisdiction over suits by a state against citizens of another state existed to avoid subjecting the plaintiff state to partiality and recrimination in the courts of a sister state. Later decisions echoed this rationale.[13] Thus the Court's emphasis in *Wyandotte* on the necessity of an unbiased alternative forum is consistent with earlier opinions. *Wyandotte* seems to represent a change in the Court's views on the burden of proving the existence of an adequate alternative forum, however. In *Georgia v. Pennsylvania Railroad Co.*,[14] the Court declared the lack of a *proven* alternative forum to be crucial to its decision to exercise its original jurisdiction; the Court heard the suit pre-

8. Missouri v. Illinois, 180 U.S. 208, 241 (1901).

9. Missouri v. Illinois, 200 U.S. 496 (1906), in which sewage allegedly originating in Illinois ultimately contaminated the Mississippi River in Missouri.

10. 28 U.S.C. §1251(a) (1970). *E.g.*, Arizona v. California, 373 U.S. 546 (1963); Nebraska v. Wyoming, 325 U.S. 589 (1945); Wisconsin v. Illinois, 278 U.S. 367 (1929); and New York v. New Jersey, 256 U.S. 296 (1921). Concerning the Supreme Court's exercise of original jurisdiction over *parens patriae* suits, *see* Comment, *The Original Jurisdiction of the U.S. Supreme Court*, 11 STAN. L. REV. 665 (1959); 48 N.C. L. REV. 963 (1970); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, Chapter 13 (2nd ed. 1970); and Comment, *Standing of States to Represent the Interests of their Citizens in Federal Court*, 21 AMER. U. L. REV. 224 (1971).

11. Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (action to enjoin the copper company's discharge of sulphur dioxide fumes that when mixed with air endangered Georgia's forests, orchards, and other crops); New Jersey v. City of New York, 283 U.S. 473 (1931) (action brought by New Jersey to enjoin the destruction of New Jersey's bathing beaches caused by New York City's dumping of garbage into the ocean).

12. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

13. The same aversion toward compelling a state to resort to the biased courts of a sister state and insistence upon the availability of a competent alternative forum was articulated in Wisconsin v. Pelican, 127 U.S. 265, 289 (1888); Missouri v. Illinois, 200 U.S. 496, 520-21 (1906); Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); Massachusetts v. Missouri, 308 U.S. 1, 19 (1939).

14. 324 U.S. 439, 465-66 (1945).

cisely because the defense had not affirmatively established that Georgia could locate another convenient forum in which district court jurisdiction over all the defendant corporations could be obtained. *Wyandotte* is clearly contrary to *Pennsylvania Railroad Co.* on this point, because the *Wyandotte* Court required no positive pleading and proof that a viable alternative forum existed.[15]

The wisdom of the Court's decision in *Wyandotte* is contingent upon the existence of alternative forums which can effectively resolve the dispute. The efficacy of these forums depends upon 1) the ability of the Ohio courts to obtain personal jurisdiction over the nonresident defendant corporations; 2) the extent to which Michigan and Canada would honor and enforce any injunction ordered by the Ohio courts; and 3) the adequacy of established mechanisms for water pollution abatement.

II. THE LONG ARM OF OHIO'S COURTS

The sole jurisdictional issue is whether Ohio can obtain *in personam* jurisdiction over Dow Canada. Since both Dow U.S. and Wyandotte are licensed to do business under Ohio's laws,[16] their vulnerability to suit in Ohio's courts is not in dispute.

Invoking conventional jurisdictional principles, Ohio's courts may seek to predicate jurisdiction over Dow Canada either upon Ohio's acknowledged jurisdiction over Dow U.S. as the sole stockholder of Dow Canada (control theory),[17] or upon Dow Canada's independent contacts with Ohio (doing business theory).[18] Both of these theories

15. This tactical switch can be justified, however. The variety of remedies now available in pollution disputes renders pleading and definite proof of the availability of an alternative forum extremely difficult. In addition, Congressional intent to resolve such disputes by conference and discussion at the state level is clear. *See* discussion of federal pollution control procedures in Section IV, *infra*.

16. Ohio's Complaint at 4, 5, Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).

17. A court may predicate jurisdiction over a nonresident subsidiary corporation upon the presence within the court's jurisdiction of the parent corporation. *See* 14 WAYNE L. REV. 1228 (1968); American Compressed Steel Corp. v. Pettibone Mulliken Corp., 271 F. Supp. 864, 867-68 (S.D. Ohio 1967).

18. Concerning the court's ability to predicate jurisdiction over a foreign corporation upon the nonresident corporation's business contacts with the forum state see Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, *cert. denied*, 389 U.S. 923 (1967), *noted in* 14 WAYNE L. REV. 1228 (1968).

were argued in the briefs.[19] Rather than consider whether *in personam* jurisdiction in this case can be predicated on these traditional criteria, this note will examine the more challenging issue: can Ohio predicate jurisdiction over Dow Canada or any nonresident corporation solely on the occurrence of tortious injury in Ohio caused by pollution originating in a foreign country or state?

Historically, *in personam* jurisdiction was predicated solely on physical control over the defendant, making the defendant's presence within the state's territory mandatory.[20] This artificial prerequisite of physical presence has yielded to the modern requirement that the defendant have certain minimum contacts with the forum state so as not to offend notions of fairness, substantial justice, and due process.[21] Thus, a state's long-arm legislation now is constrained only by the constitutional mandate of due process.[22] Yet the question remains of

19. Ohio offered evidence that the corporate officers of Dow U.S. regarded Dow Canada as one part of a unified Dow operation and that the parent/subsidiary relationship formed a sufficient jurisdictional base. Dow U.S. and Dow Canada contested the control theory, maintaining that the Canadian plant was a totally independent entity and that common directors and officers between the two corporations did not constitute a sufficient basis for jurisdiction. Alternatively, Ohio sought to predicate jurisdiction on the doing business rationale by contending that 10% of Dow Canada's business consisted of exports, principally to the United States and Great Britain. The parties vehemently disputed the factual question of whether Dow Canada actively solicited business in Ohio or was merely the passive recipient of spontaneous orders from the continental United States. *See* Briefs for all parties, Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) [hereinafter, the Briefs of the various parties in *Wyandotte* will be referred to specifically].

20. Pennoyer v. Neff, 95 U.S. 714 (1877). *See also* A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 630-31 (1965).

21. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); McGee v. International Life Insurance Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958). For a discussion of the evolution of principles governing a state's exercise of jurisdiction over nonresidents see Johnson, *How Minimum is "Minimum Contact"? An Examination of "Long Arm" Jurisdiction,* 9 S. TEX. L.J. 184, 201 (1967). (Citing the continual trend towards extending long arm jurisdiction, Johnson concludes that "In the field of tort law, the two-edged threat of the satisfaction of the 'tortious act' and/or the 'transacting business' requirements make it extremely unlikely that a defendant, particularly a corporation, can escape service.") *See also* Note, *In Personam Jurisdiction Expanded: Utah's Long-Arm Statute,* 1970 UTAH L. REV. 222 (1970); Note, *In Personam Jurisdiction Over Foreign Corporations: An Interest-Balancing Test,* 20 U. FLA. L. REV. 33 (1967); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. ILL. L.F. 533. In spite of the trend toward expanding long-arm jurisdiction, several cases have held that the 1958 *Hanson* decision restricted the earlier *McGee* holding and thus have circumscribed state long-arm jurisdiction. Tyee Construction Co. v. Dulien Steel Products Inc., 62 Wn.2d 106, 381 P.2d 245 (1963); Hearn v. Dow-Bodische Chemical Co., 224 F. Supp. 90 (S.D. Tex. 1963); O'Brien v. Comstock Foods, 123 Vt. 461, 194 A.2d 568 (1963).

22. *See* 2 TEX. TECH. L. REV. 328 (1971).

when due process is violated by eager state courts exercising long-arm jurisdiction.

The Supreme Court has not effectively circumscribed the authority of state legislatures to base *in personam* jurisdiction solely on a tortious act in one state which produces harmful consequences in the forum state.[23] Testing the extent of their jurisdictional reach, several states by statutory and decisional law have predicated jurisdiction solely on the occurrence within the forum state of the injurious consequences of a tortious act committed in a sister state.[24] A recent decision which indicates the permissible scope of state long-arm jurisdiction over a corporation of a foreign nation is *Duple Motor Bodies, Ltd. v. Hollingsworth*.[25] In that case Maui Island Tours ordered tour buses from Haleakala Motors, a Hawaiian firm, which transmitted the order to Vauxhall Ltd. of England. Vauxhall manufactured the chassis for the buses, and then had another English firm, Duple Motors, construct the bodies. The court held that Duple's construction of the bodies with

23. Blount v. T. D. Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966), a suit for invasion of privacy, indicates the extreme to which state courts have gone in extending long-arm jurisdiction to the limits of due process. In *Blount* the court found a regular distribution plan to be a sufficient contact under New Mexico's long-arm statute to establish jurisdiction over a Pennsylvania magazine publisher, the primary distributor who purchased the publisher's magazines in New York, and the independent New Mexico wholesale distributor, one of many such independent distributors throughout the United States. No other contacts with New Mexico were alleged. The *Blount* decision was *noted in* 8 NAT. RES. J. 348 (1968). *Accord,* Bibie v. T. D. Publishing Corp., 252 F. Supp. 285 (N.D. Calif. 1966).

24. Most notable are the product liability cases, exemplified by Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), in which the defendant's only contact with the forum state was the foreseeable presence there of its defective product as a result of the defendant's placing that product into normal interstate commercial channels. These cases are directly relevant to an interstate pollution controversy, because the extrastate torts of manufacturing a defective product and polluting a navigable waterway are clearly analogous. The following are among the many cases that have upheld the rationale of the *Gray* case: Coulter v. Sears, Roebuck & Co., 426 F.2d 1315 (5th Cir. 1970), *noted in* 2 TEX. TECH. L. REV. 328 (1971); Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969); Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1967), *noted in* 8 ARIZ. L. REV. 356 (1967); Metal-Matic, Inc. v. Eighth Judicial Dist. Court, 82 Nev. 263, 415 P.2d 617 (1966); Golden Gate Hop Ranch, Inc. v. Velsicol Chemical Corp., 66 Wn.2d 469, 403 P.2d 351 (1965), *cert. denied,* 382 U.S. 1025 (1966). *Contra:* Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). Oliver v. American Motors Corp., 70 Wn.2d 875, 425 P.2d 647 (1967), *noted in* 44 WASH. L. REV. 490 (1969); O'Neal Steel, Inc. v. Smith, 120 Ga. App. 106, 169 S.E.2d 827 (1969), *noted in* 6 GA. ST. BAR J. 202 (1969); Uppgren v. Executive Aviation Services, Inc., 304 F. Supp. 165 (D.C. Minn. 1969), *noted in* 36 J. AIR LAW & COMM. 346 (1970) (criticized). *See generally* Comment, *In Personam Jurisdiction over Nonresident Manufacturers in Product Liability Actions,* 63 MICH. L. REV. 1028 (1965).

25. 417 F.2d 231 (9th Cir. 1969).

the *knowledge* that the buses ultimately were destined for Hawaii constituted sufficient contact with the forum to satisfy due process requirements and establish jurisdiction under Hawaii's long-arm statute.[26] The tenuous nature of the foreign defendant's contact with the forum state in *Duple* certainly suggests that the more direct relation between Dow Canada and Ohio forms a constitutionally sufficient jurisdictional base.

Although no case has yet predicated jurisdiction *solely* on pollution originating outside of the forum,[27] such a jurisdictional base would seem to satisfy due process requirements. In the products liability area, the courts have weighed such elements as inconvenience to the parties, the interest of the forum state in the litigated subject, and the desire for efficient judicial administration[28] in determining whether long-arm jurisdiction preserves the defendant's constitutional right to due process.[29]

The only remaining justification for withholding jurisdiction over the nonresident polluter is the fear that he will be subjected to inequitable treatment by biased courts of a sister state.[30] This fear superficially appears to be borne out by the *Wyandotte* case, for the undisputed facts suggest that Ohio is indeed biased in its efforts to obtain a judgment against Wyandotte and Dow. While taking no action against Ohio corporations which are known to pollute Lake Erie with mercury,[31] Ohio instituted the instant suit even though Dow Canada im-

26. Duple was compelled to defend itself in Hawaii in a suit for negligent manufacture brought by a passenger who was injured when one of the buses skidded off the highway and overturned while being operated by Maui Island Tours.

Duple has been noted in 24 Sw. L.J. 532 (1970). Another note on *Duple,* 12 B.C. Ind. & Comm. L. Rev. 130, 133 (1970), considered the application of domestic due process standards ill advised in the international situation, deeming *Duple* an "... unfair extension of the liberalized jurisdictional rule to a foreign defendant." Compare Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292 (6th Cir. 1964), in which jurisdiction over the French manufacturer of Renault automobiles was denied in an analogous situation.

27. *See* 1 Env. L. Rep. 10038, 10039 (1971), which suggests that *Wyandotte* may imply the Court's willingness to uphold long-arm jurisdiction when the nonresident defendant's only contact with the forum state is the extraterritorial discharge of pollutants which ultimately contaminate interstate waters in the forum state.

28. These factors are identified, discussed, and approved in 20 U. Fla. L. Rev. 33 (1967), *supra* note 21, at 37.

29. *See* 8 Nat. Res. J. 348 (1968), in which the author identifies 1) avoidance of unreasonable hardship on the defendant, 2) existence of minimum contacts with the forum and 3) foreseeability of injury in the forum as essential to assure due process.

30. *See* Woods and Reed, *supra* note 3, at 696.

31. Brief of Dow Canada in Reply at 8, 15, Appendix V; Brief of Dow Canada in Opposition to Motion for Leave to File Complaint at 9.

plemented radical steps to abate its mercury pollution as soon as its harmful effects became known.[32] Other known mercury polluters were not even joined.[33] Ohio apparently desired the defendant corporations to pay for the total removal of mercury from Lake Erie,[34] although there was great doubt whether *any* mercury from Dow Canada's Sarnia plant reached Ohio waters.[35] Moreover, scientists themselves do not know how to clean up existing mercury pollution.[36]

Even hypothesizing state court bias, however, the *Wyandotte* decision has merit. The fear of state court bias should be dispelled by the realization that a nonresident corporation which has been treated unfairly can obtain Supreme Court review.[37] The Supreme Court is better equipped to function as an appellate rather than original tribunal, and it can more easily detect forum state bias after the facts of the case have been distilled in a prior adjudication. *Wyandotte* merely withholds the *original* jurisdiction of the Supreme Court, not appellate review.

Forum state harm caused by extrastate pollution presents an even more compelling case for state long-arm jurisdiction than does the negligent manufacture of a defective product. Defective products usually threaten only a few persons; pollution, by contrast, can detrimentally affect a major segment of a state's population. To deny jurisdiction is to assert that so long as a nonresident corporation scrupu-

32. Brief of Dow Canada in Opposition to Motion for Leave to File Complaint at 7-8, 33-34, Appendices VI and VII; Brief of Dow Canada in Reply at 4. In their briefs Ohio and Dow Canada bicker over whether Dow is continuing to discharge a small amount of mercury; but the *undisputed* facts show that Dow Canada immediately cemented shut its mercury-disgorging conduit until its production processes could be altered to abate the pollution (Brief of Dow Canada in Opposition to Motion for Leave to File Complaint at 7), and that Dow Canada now has reduced its pollution from thirty pounds of mercury per day to less than one pound (Brief of Ohio in Support of the Motion for Leave to File Complaint at 2-3, Appendix II), a smaller discharge than scientists throughout the world previously had thought possible (Brief of Dow Canada in Reply at 5-7).

33. Brief of Dow Canada in Reply at 2, 15. Brief of Dow U.S. in Reply to Brief of the U.S. as Amicus Curiae at 6.

34. Brief of Dow Canada in Reply at 16-17.

35. *Id.* at 14.

36. Brief of Dow Canada in Reply at 9. Dredging, originally thought to be a panacea, may cause more damage than leaving the lake alone. *Id.* at 9-10; Brief of Dow Canada in Opposition to Motion for Leave to File Complaint at 10.

37. Harlan explicitly expressed the Supreme Court's concern to guarantee that Ohio's courts render an impartial judgment: ". . . this Court . . . if called upon to assess the validity of any decree rendered against either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice. . . ." *Wyandotte*, 401 U.S. at 500.

lously avoids all business contact with another state, it may freely dump its refuse, however noxious, with utter lack of concern for residents of the adjacent state. Judicial sanction of such a principle would encourage corporations to locate upstream or upwind from neighboring states and to market their products everywhere but in the state which has been selected as the receptacle for their industrial wastes.

Although it appears that Ohio may constitutionally exercise jurisdiction over Dow Canada, there still remains the question of whether Ohio statutes as presently worded enable her to obtain this jurisdiction. The relevant portion of Ohio's long-arm statute provides for out-of-state service of process upon any nonresident corporation which causes:[38]

> . . . tortious injury in this state by an act or omission outside this state if [the corporation] does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this state.

In requiring certain minimum contacts with Ohio in addition to the tortious injury therein,[39] the Ohio law is more conservative than stat-

38. OHIO R. CIV. P. 4.3(A)(4) (1971).

39. Most cases under the relevant long-arm provision are federal district court diversity cases. The only decision rendered by an Ohio state court construing Ohio's long-arm statute is McHugh v. Prestodial, Inc., 45 Ohio Op. 2d 97, 241 N.E.2d 102 (C. P. Hamilton Cty., 1968), which is not directly in point because no tortious injury to Ohio citizens was involved. The decision is significant, however, because the judge listed four factors which were important to his decision:

1. No representative or agent of the defendant ever came into Ohio.
2. In essence, it was a solitary business transaction. . . .
3. The money value of the transaction ($4,475.00) was not substantial. . . .
4. There was no tortious injury to anyone in this state. . . .

Id., 241 N.E.2d at 104. In Stewart v. Bus & Car Co., 293 F. Supp. 577 (N.D. Ohio 1968), the court explicitly construed the Ohio long-arm rule as narrower than the Illinois rule established by the *Gray* decision, *supra* at note 24. The Ohio district court held that an Ohio long-arm clause identical to the current rule (*see* text accompanying note 38, *supra*) required additional contacts with Ohio if all the defendant's tortious activities occurred outside of the state. *See also* Didactics Corp. v. Welch Scientific Co., 291 F. Supp. 890 (N.D. Ohio 1968); Moriarty v. General Tire and Rubber Co., 289 F. Supp. 381 (S.D. Ohio 1967). Compare the following Ohio federal district court decisions construing Ohio's long-arm statute to obtain an understanding of what the Ohio federal district courts think the Ohio state courts would consider to be sufficient minimum contacts within the limits of due process: Seilon, Inc. v. Brema S.p.A., 271 F. Supp. 516 (N.D. Ohio 1967); American Compressed Steel Corp. v. Pettibone Mulliken Corp., 271 F. Supp. 864 (S.D. Ohio 1967); Busch v. Service Plastics, Inc., 261 F. Supp. 136 (N.D. Ohio 1966) (The court upheld jurisdiction in products liability action for tortious injury where defendant nonresident corporation had systematic business contacts with Ohio and derived substantial revenue from goods sold to an Ohio corporation, where the subsequent sale of those products to Ohio consumers reasonably should have been fore-

utes which have been found constitutional in previous product liability decisions[40] and seems consonant with the minimum contacts, substantial justice, and fair play requirements advocated by the Supreme Court.[41]

To obtain jurisdiction over nonresident polluters, the Ohio courts might liberalize the previous interpretation of Ohio's long-arm statute[42] by deeming the tortious injury itself the required minimum contact. Such a liberalization appears constitutionally warranted by the trend toward increasing *in personam* jurisdictional reach by the state courts, although the conservative inclination of the Ohio courts and legislature evidenced by past decisions and the wording of the Ohio long-arm statute might cause the Ohio courts to decline jurisdiction. If jurisdiction were denied on constitutional (due process) grounds, Ohio could appeal that decision, and the Supreme Court has impliedly committed itself to sustain the constitutionality of Ohio court jurisdiction by its own decision to decline jurisdiction over *Wyandotte*. However, if the Ohio courts simply decided that the Ohio *statute* did not permit them to exercise jurisdiction, plaintiff Ohio could then move for leave to file another bill of complaint in the original jurisdiction of the Supreme Court, offering to prove that the theoretical alternative forum which justified the Supreme Court's denial of jurisdiction did not in fact exist.

Assuming satisfactory resolution of the jurisdictional issue, it is now necessary to consider the extrastate enforceability of an Ohio court's decree.

III. THE EXTRATERRITORIAL ENFORCEABILITY OF OHIO'S JUDGMENT

The discussion here will be confined to the enforceability of Ohio's judgment in a sister state. Enforcement in Canada of any United States decree, whether rendered by Ohio or by the United States Supreme

seen). Note that in *McHugh v. Prestodial, Inc.*, the court noted the *Busch* decision and explicitly approved some of its language. *McHugh*, 241 N.E.2d at 104.

40. Compare products liability cases cited in note 24, *supra*.

41. International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See also* 35 U. CIN. L. REV. 157, 164-65 (1966).

42. One decision suggests that a change in interpretation might not be required. *See* Didactics Corp. v. Welch Scientific Co., 291 F. Supp. 890 (N.D. Ohio 1968), construing Ohio's long-arm statute as coextensive with the due process requirements of the Federal Constitution. *But see* note 39, *supra*.

Court, depends upon Canada's willingness to honor the judgment for reasons of convenience and utility under the principles of comity.[43]

The U.S. Constitution requires states to give full faith and credit to the "public Acts, Records, and judicial Proceedings of every other State,"[44] to secure the benefits of national unity in a federal system by assuring that judgments will be given uniform effect throughout the nation.[45] Judicial interpretation of the full faith and credit clause and its implementing statute[46] has not been easy. The general rule[47] is that full faith and credit must be granted to any final judgment[48] resulting from judicial proceedings in which the parties have obtained a decision on the merits from an unprejudiced court possessing jurisdiction over the parties and subject matter.[49] Money judgments generally are deemed enforceable in a sister state, although such judgments need not be enforced by a sister forum if:[50] 1) the suit is barred by the second forum's statute of limitations, 2) the second state does not have the power to hear suits between the parties to the judgment, and possibly if 3) the underlying cause of action is penal in nature. Aside from

43. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 34-37, 834 (1965); 12 B.C. IND. COMM. L. REV. 130, 134 (1970). On the recognition of internationally foreign judgments, *see* Von Mehren and Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach,* 81 HARV. L. REV. 1601 (1968). *See also* The Salton Sea Cases, 172 F. 792 (9th Cir. 1909).

44. U.S. CONST. art. IV, §1.

45. Avins and Rosenberg, *The Full Faith and Credit Clause In the U.S. Constitution: An Instrument of Federalism,* 6 WASHBURN L.J. 96 (1966) [hereinafter cited as Avins and Rosenberg]. The article discusses "... the manner in which the full faith and credit clause of the Constitution promotes a harmonious federalism within the context of a rightful respect for the right of individual states." *Id.* at 97. *See also* Nadelmann, *Full Faith and Credit to Judgments and Public Acts,* 56 MICH. L. REV. 33 (1957).

46. 28 U.S.C. §1738 (1970). The implementing statute provides that authenticated copies of a state's judicial proceedings "shall have the same full faith and credit in every court within the United States ... as they have by law or usage" in the court which rendered the judgment.

47. Avins and Rosenberg, *supra* note 45, at 98, 112 (1966); Averill, *Choice-of-Law Problems Raised by Sister State Judgments and the Full Faith and Credit Mandate,* 64 NW. U.L. REV. 686, 687 (1970).

48. *See* Hendrix v. Hendrix, 160 Conn. 98, 273 A.2d 890 (1970); and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 107 (1971) on requirement of finality. *See also* Barber v. Barber, 323 U.S. 77 (1944); Sistare v. Sistare, 218 U.S. 1 (1910); Lynde v. Lynde, 181 U.S. 183 (1901).

49. *See* Midessa Television Co. v. Motion Pictures for Television, Inc., 290 F.2d 203 (5th Cir. 1961); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 104 (1971); and Avins and Rosenberg, *supra* note 45, at 102-03. *See also* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); Sherrer v. Sherrer, 334 U.S. 343 (1948).

50. Reese, *Full Faith and Credit to Foreign Equity Decrees,* 42 IOWA L. REV. 183, 185 (1957) [hereinafter cited as Reese].

these narrow exceptions,[51] full faith and credit must be given to judgments at law.

Despite the constitutional mandate, courts have been reluctant to give full faith and credit to foreign equity decrees.[52] This reluctance originated in the anachronistic belief that judgments at law were superior to equity decrees and that an equity decree made its subject responsible only to the issuing court.[53] Nevertheless, subject to the foregoing requirements, equity decrees which order the payment of money or the alteration of a status (e.g., marital status by divorce) consistently have been accorded the *res judicata* effect of full faith and credit in sister states under modern law.[54] Thus if Ohio obtained a final judgment on the merits, clearly she could secure payment of any damages awarded by bringing an action on the judgment debt in any

51. In addition to the above exceptions, predominant forum state interest or overriding national interest occasionally may limit the application of the full faith and credit doctrine. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971). *See also* Reese, *supra* note 50, at 201, where the author formulates an exception to full faith and credit based on a national interest in procuring the child's best interest in child custody cases. In the *Wyandotte* situation, Michigan would not seem to have a predominant interest which would preclude the enforcement of an Ohio injunction, although its courts might be tempted to assert such an interest to protect profitable Michigan industries. Such an explicit assertion would not appear to have much to commend it on appeal, however. Michigan would have great difficulty persuading the Supreme Court that Michigan's business interests must prevail to the detriment of citizens of both Michigan and Ohio. *See* Fauntleroy v. Lum, 210 U.S. 230 (1908), which held that a Missouri judgment was entitled to full faith and credit even though it infringed on the interests of the forum state, Mississippi. *See also* Comment, *Full Faith and Credit to Judgments: Law and Reason Versus the Restatement Second*, 54 CALIF. L. REV. 282, 287-89, 291 (1966), in which the author contends that case law does not justify the Restatement §103 exception, and that the exception would be detrimental to the federal system.

52. Ohio perhaps could avoid the problem of full faith and credit enforceability of equitable decrees by placing the defendants in contempt of court and levying a large contempt fine if they refused to comply with Ohio's injunction to stop polluting. While contempt judgments generally are entitled to full faith and credit, as are all money judgments (*see* text accompanying notes 50 and 54), the contempt decree might *not* be enforceable to the extent that the Michigan court deemed it to be an excessive, *penal* assessment. On the existence of a possible penal law exception to full faith and credit enforceability, see Avins and Rosenberg, *supra* note 45, at 100; Attrill v. Huntington, 70 Md. 191, 16 A. 651 (1889); Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198 (1918). The Supreme Court, however, has never explicitly refused to require full faith and credit because of the penal nature of a judgment. Using the contempt decree as an avenue of escape for Ohio from the dubious enforceability of its injunction appears to be only a precarious hope, since 1) it makes Michigan's appraisal of Ohio's assessment pivotal, 2) any contempt fine high enough to make the defendants stop polluting would almost certainly be vulnerable to attack as penal, and 3) payment of a lesser, clearly non-penal contempt fine would probably not cause the defendants to stop polluting.

53. Reese, *supra* note 50, at 189-90; A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 992 (1965).

54. Reese, *supra* note 50, at 192; Avins and Rosenberg, *supra* note 45, at 99.

other state with jurisdiction over the judgment debtor's person or property.[55]

The problem is the degree of recognition that should be accorded other types of equitable decrees.[56] In the absence of a definitive Supreme Court opinion, it remains uncertain whether a valid Ohio decree enjoining the defendants from performing certain acts (i.e., discharging mercury) is entitled to full faith and credit. While courts generally are divided on the issue,[57] several state court decisions explicitly state that full faith and credit applies equally to law and equity decrees.[58] Although the Supreme Court has not yet decided whether an equitable decree would be entitled to full faith and credit,[59] the weight of modern authority indicates that a valid injunction would be enforceable in another state.[60]

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55. Reese, *supra* note 50, at 185. Note that in Michigan the procedure would be even less complex, for Michigan has adopted a Uniform Foreign Money Judgments Recognition Act, MICH. STAT. ANN. §27.955 (1-9) (1971), which renders a valid foreign money judgment conclusive and enforceable without further court proceedings, much as a district court monetary judgment becomes enforceable in other districts merely by registration thereof. 28 U.S.C. §1963 (1970).

56. *See, e.g.*, Philadelphia Baseball Club Co. v. Lajoie, 13 Ohio Dec. 504 (C.P. Cuyahoga Cty., 1902).

57. For a list of authorities on both sides of the issue see RESTATEMENT (SECOND) OF CONFLICT OF LAWS §102, Reporter's Note to comments c and d (1971) (land conveyance).

58. *E.g.*, McElroy v. McElroy, 256 A.2d 763, 765 (Del. 1969); and especially Rich v. Con-Stan Industries, 449 S.W.2d 323 (Tex. 1969), *noted in* 2 TEX. TECH. L. REV. 137 (1970), in which the court deemed enforcement of a permanent California injunction against the unauthorized use of two registered trademarks required by full faith and credit. The court explicitly stated:

> . . . insofar as the full faith and credit clause of the U.S. Constitution is concerned, there is no difference between an equitable decree and other judgments. We think the full faith and credit clause applies to all valid, final judgments of another state.

Rich, 449 S.W.2d at 325.

59. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, comment c (1971).

60. Avins and Rosenberg, *supra* note 45, at 101. Subject to the requirements of finality, jurisdiction, and due process discussed *supra*, the courts consistently have expanded the applicability of full faith and credit to foreign decrees ordering the conveyance of land, the payment of alimony or child support, and the transfer of child custody. On decrees ordering the conveyance of land, by far the majority of courts uphold the enforceability of a sister state decree in the forum state. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, comment d (1971); and Higginbotham v. Higginbotham, 92 N.J. Super. 18, 222 A.2d 120, 125 (1966). *Compare* Fall v. Eastin, 215 U.S. 1 (1909), discussed in Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 635-37 (1965). *See also* cases collected in A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 1485-1591 (1965) on the application of the full faith and credit doctrine to divorce, support, alimony, and child custody decrees. Withdrawing its previous contention that a valid injunction was unenforceable in a sister state, the Restatement now states that:

> A valid judgment that orders the doing of an act other than the payment of money,

Perhaps the most cogent argument that both Michigan and the Supreme Court on appeal would deem an Ohio injunction enforceable is the simple fact that there is no constitutional or statutory authority for limiting the constitutional mandate of full faith and credit.[61] *Wyandotte* may imply the Court's willingness to require extrastate enforcement of a state court's injunction;[62] it makes nonsense of the *Wyandotte* decision to hypothesize that the Supreme Court subsequently would refuse to require Michigan to enforce an injunction issued by Ohio's courts, when the Supreme Court's whole rationale *implicitly* depends upon the Ohio court's ability to render and enforce a judgment as effective as that of the Supreme Court.

Thus the Supreme Court was probably correct in assuming that the Ohio courts can obtain jurisdiction over all the defendant corporations and issue an enforceable judgment. An examination of possible alternative remedies and forums available to Ohio other than a public nuisance action in its state courts is now necessary.

IV. FEDERAL WATER POLLUTION CONTROL PROCEDURES

In recent years the federal government[63] has made substantial prog-

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or that enjoins the doing of an act, *may* be enforced, or be the subject of remedies in other states.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 (1971) (emphasis added). The comment to that section, noting the absence of a definitive statement by the Supreme Court, adopted a wait-and-see approach regarding required enforceability of a sister state's injunction. The Supreme Court's decision in *Wyandotte* may be the official sanction the commentator awaited.

61. *See* Ferster v. Ferster, 220 Ga. 319, 138 S.E.2d 674 (1964); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, comment c (1971); and Rich v. Con-Stan Industries, 449 S.W.2d 323, 326 (Tex. 1969), where the court concluded:

We do not find any language in either Sec. 1 of Art. 4 of the U.S. Constitution or Sec. 1738 of Title 28 U.S.C.A., that in our opinion could be construed as excluding permanent injunction judgments from being entitled to full faith and credit.

See also 2 TEX. TECH. L. REV. 137 (1970).

62. Although full faith and credit was not discussed in the *Wyandotte* decision, the uncertain enforceability of any decision ultimately rendered by the Supreme Court against Dow Canada, if it chose to assert jurisdiction, was urged as a reason for declining original jurisdiction. *See* Brief of Dow Canada in Opposition to Motion for Leave to File Complaint at 35. Since the issue of the enforceability of the U.S. Supreme Court's own judgment was briefed, it would appear that the Supreme Court considered the possible problem of enforceability of Ohio's decree, and consciously elected to regard that problem as insubstantial. Since the issue was not explicitly before the court, however, the court may not have reached this issue.

63. Although agencies other than those created pursuant to the federal water pollution control law are involved in regulating pollution which affects Lake Erie (i.e.,

ress in enacting water pollution control law.[64] The water quality legislation authorizes the Environmental Protection Agency [EPA] to encourage the development of water quality standards pursuant to the express national goal of abating water pollution.[65] The theme of the water quality legislation is federal-state and interstate cooperation,[66] with emphasis on local responsibility for water pollution control.[67] The statutes establish detailed provisions for coordination of federal and state authority, provisions which induce state cooperation by grounding federal "encouragement" on the government's ultimate authority to exact penalties[68] and institute court action[69] to procure enforcement of water quality standards. There is no question of federal preemption of the regulation of pollution of interstate or navigable waters, however, for Congress explicitly stated its purpose: ". . . to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution."[70] Since federal water pollution law clearly favors state enforcement,[71]

Michigan Water Resources Commission, Ontario Water Resources Commission, and the International Joint Commission established by the Boundary Waters Treaty of 1909; *Wyandotte*, 401 U.S. at 502-03), those agencies would not help Ohio to obtain abatement of the specific acts of pollution which Ohio protests. Not only has Dow Canada complied with the regulations established by the Ontario Water Resources Council (Brief of Dow Canada in Opposition to Motion for Leave to File Complaint at 33, Appendices VI and VII), but out-of-state regulatory agencies would probably not react favorably to Ohio's request until Ohio forced its own industries to comply with the stringent standards it seeks to impose on the nonresident corporations. *See* discussion in text accompanying notes 31-35, *supra*.

64. Most of that law now is codified as 33 U.S.C.A. §§ 1151-60 (1970). This law has been altered by executive order so that the authority granted therein now belongs to the newly created Environmental Protection Agency instead of to the Secretary of the Interior. *See Reorganization Plan No. 3 of 1970*, 35 FED. REG. 15623 (1970). *See also* 33 U.S.C.A. § 1165 (1970), which specifically authorizes water pollution control projects for the Great Lakes area.

65. 33 U.S.C.A. § 1151(a) (1970). The primary authority to create and enforce water pollution standards, however, rests with the states. 33 U.S.C.A. §§ 1151(b), 1151(c), 1160(b) (1970).

66. 33 U.S.C.A. § 1154 (1970).

67. The EPA's power to prepare water quality regulations is totally contingent upon state default in setting standards adequate "to protect the public health or welfare, enhance the quality of water and serve the purposes" of the water quality legislation. 33 U.S.C.A. § 1160(c)(3) (1970). Pursuant to the federal statutes, both Ohio and Michigan adopted water quality standards applicable to Lake Erie which have been deemed to meet the criteria of the federal water pollution control legislation. *See* 18 C.F.R. § 620.10 (1971).

68. 33 U.S.C.A. §§ 1160(d)(3), 1160(k)(2) (1970).

69. 33 U.S.C.A. § 1160(g) (1970).

70. 33 U.S.C.A. § 1151(b) (1970).

71. 33 U.S.C.A. §§ 1151(b), 1151(c), 1160(b) (1970). *See* Abkin, *Federal Programs for Water Pollution Control*, 1 U.C. DAVIS L. REV. 71, 100-03 (1969) for a criticism of the federal legislation's emphasis on local control and its relegation of the federal government to a secondary, supportive role.

federal procedures exist only as a last resort in the event no state elects to file suit to enforce state water pollution regulations. A court action to secure abatement on behalf of the United States, moreover, is contingent upon both the independent decision of the EPA to proceed and voluntary action by the U.S. Attorney General.[72] In enforcing federally approved water pollution control standards, compliance has been obtained primarily through conference and the impact of public opinion rather than through court action.[73]

Because conference and discussion are its primary tools and because of the discretion vested in the EPA administrator,[74] the legislation has obvious deficiencies if one's goal is rapid and mandatory curtailment of pollution. Administrative remedies nevertheless seem preferable to the original jurisdiction of the Supreme Court. In providing for the initial investigation of the facts by an agency which is expert in such discovery, administrative procedures shield the Supreme Court from performing the role of fact finder in the complex area of water pollution, while they do not necessarily preclude ultimate judicial review of the agency's determination.[75] Further, the provision for discretionary federal enforcement does not preclude state enforcement of water quality regulations through court action.[76]

Thus, avenues to court action other than original jurisdiction of the Supreme Court are available to a state adversely affected by pollution originating in another state.[77] Not only may the aggrieved state bring

72. After giving a violator 180 days notice, 33 U.S.C.A. § 1160(c)(5) (1970), the EPA administrator *may* (with written consent of the governor required if the breach of the pollution standards endangers only the citizens of the state where the discharge occurs) *request* the U.S. Attorney General to bring suit against the violator on behalf of the United States. 33 U.S.C.A. § 1160(g) (1970).

73. *See* S. DEGLER & S. BLOOM, FEDERAL POLLUTION CONTROL PROGRAMS: WATER, AIR, AND SOLID WASTES 6, 7 (1969). Degler and Bloom report that of 45 cases in which conferences have been convened to enforce water pollution control standards, only three have proceeded to public hearings and only one to court action. Eleven have been resolved in compliance with the federal government's recommendations, twenty are achieving progress satisfactory to the federal government, and thirteen are still pending. Degler and Bloom discuss enforcement procedures and list the current status of 46 enforcement actions under the Federal Water Pollution Control Act. *Id.* at 47-53.

74. For a criticism of the federal enforcement procedure and an indictment of its deficiencies, see J. BRECHER & M. NESTLE, ENVIRONMENTAL LAW HANDBOOK 221-22, 223-24 (1970).

75. *See* discussion in Section V, *infra*.

76. *See* notes 70-71 and accompanying text, *supra*.

77. For a general discussion of procedures and problems attendant upon environmental litigation, see J. BRECHER & M. NESTLE, ENVIRONMENTAL LAW HANDBOOK 93-145 (1970).

an action in its own or the offending state's courts on a public nuisance theory; it also may seek redress at the state court level based on violation of federally sanctioned state or interstate water quality regulations (probably indirectly by seeking review of an administrative determination by the cognizant state water pollution control agency).[78] In addition the state may seek direct assistance from the EPA.[79] Since the courts thus appear to be available at the state level, providing litigants with the ultimate recourse of Supreme Court review, exercise of the original rather than the appellate jurisdiction of the Supreme Court is not justified in the *Wyandotte* situation where the plaintiff has not even sought relief at the state level before petitioning the Supreme Court.

V. THE ELUSIVE FORUM

The ominous possibility remains, however, that the alternative forums theoretically available to Ohio and other plaintiffs with similar grievances will not materialize. The disturbing hypothetical unfolds as follows. Ohio first might obtain *in personam* jurisdiction and bring an action in its state courts. The Ohio state courts nevertheless might refuse to entertain the public nuisance suit, asserting that a federal or state agency bears the primary responsibility for water pollution abatement.[80] Ohio then could request the EPA administrator[81] to file

78. Such judicial review is authorized by the Administrative Procedure Act, 5 U.S.C. § 702 (1970), which provides that: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *But see* notes 84-85 and accompanying text, *infra*.

79. A state's governor or water pollution control agency may initiate the EPA enforcement procedure by requesting the EPA administrator to convene a conference concerning the extrastate pollution which is endangering the requesting state's citizens. *See* 33 U.S.C. § 1160(d)(1)(1970).

80. The Ohio courts could justify this action by the doctrine of *primary jurisdiction* which enables courts to defer action until the problem is reviewed by the cognizant agency. *See* K. DAVIS, ADMINISTRATIVE LAW 363-64 (1965). Once a dispute is referred to the proper administrative agency, an aggrieved party's only possible recourse is court review of the administrative agency's resolution; the court will *not* examine the controversy anew. For a chart of the agencies which perform water management functions in Ohio see OHIO WATER COMM'N, RECOMMENDATIONS ON WATER POLICY AND LEGISLATION 4 (1963).

81. Ohio could also request the appropriate state official to take action to exact compliance with the federally approved state regulations if interstate pollution were not involved. A process analogous to that described in the remainder of this paragraph of the text could then occur under state administrative law.

suit in the name of the United States against the polluters charged with violating the EPA-approved water quality regulations. The EPA administrator, in his discretion, might decide not to request the Attorney General to bring an action on behalf of the United States. Undaunted, Ohio could return to its federal district courts, seeking review of the EPA's decision not to file suit.[82] The courts again might refuse to hear Ohio's complaint, this time asserting that the EPA administrator's authority to bring an action is made discretionary by law[83] and as such falls within the statutory exception[84] to the general right to review of agency actions.[85]

This circuitous denial of access to the courts could occur;[86] the elaborate statutorily established mechanisms for solving water pollution disputes which justify the Supreme Court's refusal to hear Ohio's case conceivably could become an administrative quagmire in which Ohio might be denied her day in court.[87] That result clearly would be contrary to the viable alternative forum principle wisely formulated

82. Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970).

83. 33 U.S.C.A. § 1160(g) (1970).

84. 5 U.S.C. § 701(a)(2) (1970). See K. DAVIS, ADMINISTRATIVE LAW 513-14 (1965), where Davis states that when the right to initiate proceedings is committed by law to agency discretion, the decision not to proceed is unreviewable. Davis remarks:

> But deficiency of administrative zeal may be as grievous a fault as excessive zeal, although silent inaction seldom hits the headlines. One of the greatest dangers of the administrative process is that an agency through lethargy or through immoderate yielding to the influence of the regulated groups may thwart the democratic will by acting only when prodded by private interest.

Id. at 79.

85. *See* Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317 (1958). In Bishop Processing Co. v. Gardner, 375 F.Supp 780 (Md. 1967), the court refused to review the decisions of a hearing board under the Clean Air Act because the alleged polluter would obtain judicial review if the Secretary of H.E.W., exercising his statutory discretion, elected to file suit on behalf of the United States. *See also* Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967), and cases cited therein. *See* generally Miller, *Ecology and the Administrative Process*, 23 ADMIN. L. REV. 59 (1970).

86. That discretionary agency refusal to prosecute is a very real problem is pointed out in K. DAVIS, DISCRETIONARY JUSTICE 212-13 (1970), where Davis notes that review of an administrative officer's decision not to prosecute may be obtained only if it is a patent abuse of discretion, citing Moog Industries v. FTC, 355 U.S. 411, 414 (1958). Labor law cases supporting Davis' conclusion include: Hourihan v. NLRB, 201 F.2d 187 (D.C. Cir. 1952); Div. 1267, Street, Electric Ry. and Motor Coach Employees v. Ordman, 320 F.2d 729 (D.C. Cir. 1963); Local 954, Retail Clerks International Ass'n v. Rothman, 298 F.2d 330 (D.C. Cir. 1962); Lincourt v. NLRB, 170 F.2d 306 (1st Cir. 1948).

87. *See* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 629 (1970). Advocating a relaxation of restrictions on judicial review of administrative decisions, Sive maintains that ultimately the courts are more competent to weigh and balance conflicting social policies and economic interests so prevalent in environmental disputes.

by the Supreme Court over the years, and that result just as clearly would transform *Ohio v. Wyandotte Chemicals Corp.* into an entirely different case. *Wyandotte's* message is that alternative mechanisms whose usual function is the initial resolution of water pollution or public nuisance disputes should be exhausted first; if those other forums are denied to a plaintiff state whose citizens are threatened by a nonresident corporation's pollution, the *Wyandotte* decision implies that the aggrieved state then would have a cogent argument for the Supreme Court's exercise of original jurisdiction.